TETUAN LM ONG & CO A

v.

CHIA KAH GEK

COURT OF APPEAL, PUTRAJAYA B
GOPAL SRI RAM FCJ
RAUS SHARIF JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: J-02-469-2006]
25 NOVEMBER 2009 C

CIVIL PROCEDURE: *Counterclaim - Striking out - Whether counterclaim maintainable in law - Whether counterclaim must have material affinity with subject matter of claim - Whether test in Esso Standard Malaysia v. Southern Cross Airways (Malaysia) Bhd met* D

CIVIL PROCEDURE: *Injunction - Setting aside - Setting aside of injunctive order - Whether proper as it was a consequential order that could be made anytime*

The plaintiff, due to a dispute arising from a sale and purchase E
agreement between her and the 2nd defendant, sought, *inter alia*, a declaration that the clause in the sale and purchase agreement providing for the retention of the proceeds of sale by the 1st defendant/appellant ('defendant') as stakeholder was of no further F
effect. The defendant filed a defence and a counterclaim premised on defamation. The plaintiff then sought determination as to whether the defendant's counterclaim for defamation was maintainable in law, being *ex facie* against her as the administratrix of her deceased parents' estate. The deputy registrar answered the G
above question in the negative and dismissed the entire counterclaim, ruling that it was not maintainable in law by virtue of the proviso in s. 8(1) of the Civil Law Act 1956 ('Act') read together with O. 15 r. 6A(1) to (2) of the Rules of the High Court 1980. On appeal, the High Court judge affirmed the decision of the H
deputy registrar and further ordered that the injunction granted by him on 17 June 2005 (preserving the sum of RM500,000 as security pending the disposal of the defendant's counterclaim) be set aside. Hence, the present appeal by the defendant.

I

Held (dismissing the appeal with costs)
Per Gopal Sri Ram FCJ:

(1) This was a case in which the plaintiff's claim was essentially monetary in nature based on a clause in an agreement for the sale and purchase of land. The defendant's counterclaim was based on an alleged defamatory statement made in the course of correspondence. The question was not the one that counsel addressed, namely, the application of the proviso to s. 8(1) of the Act. The true question was whether as a matter of procedure the counterclaim was properly joined in the present instance, which must be answered against the defendant. Since the counterclaim in the present case did not meet the test laid down in *Esso Standard Malaysia v. Southern Cross Airways (Malaysia) Bhd*, it must be struck out. The decision of the High Court may therefore be sustained on this ground. *Esso Standard Malaysia v. Southern Cross Airways (Malaysia) Bhd* (foll); *High Commissioner for India & Ors v. Ghosh* (foll); *Mobil Oil Malaysia Sdn Bhd v. Yap Eng Hock* (ovrd). (paras 2, 3, 4 & 5)

Per Sulong Matjeraie JCA:

(1) The setting aside of the injunctive order preserving the sum of RM500,000 made by the High Court judge was proper as it was a consequential order which could be made anytime. (para 22)

(2) The High Court judge's dismissal of the appeal was correct but it should have been for a completely different reason. As a rule, a counterclaim must be sufficiently connected with the claim. Material affinity with the subject matter of the claim must be present in the counterclaim in order for it to survive. A counterclaim for defamation could not be maintained in an action for a claim seeking a declaration that the clause in the sale and purchase agreement providing for the retention of the proceeds of sale by a stakeholder was of no effect. In the upshot such a counterclaim should never have been filed. *Esso Standard Malaysia v. Southern Cross Airways (Malaysia) Bhd* (foll). (paras 24, 25 & 26)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif, akibat suatu pertikaian yang timbul daripada satu perjanjian jual beli di antaranya dan defendan kedua, menuntut, antara lain, suatu deklarasi bahawa klausa dalam perjanjian jual beli tersebut yang menyediakan untuk tahanan hasil jualan oleh defendan pertama/perayu ('defendan') sebagai pemegang amanah tidak mempunyai kesan lagi. Defendan memfailkan suatu pembelaan dan tuntutan balas berdasarkan fitnah. Plaintif kemudiannya menuntut penentuan sama ada tuntutan balas defendan untuk fitnah dapat dikekalkan dalam undang-undang, kerana ia *ex facie* terhadapnya sebagai pentadbir estet ibubapanya yang telah meninggal dunia. Penolong pendaftar menjawab soalan di atas dalam bentuk negatif dan menolak keseluruhan tuntutan balas tersebut, memutuskan bahawa ia tidak dapat dikekalkan dalam undang-undang menurut proviso dalam s. 8(1) Akta Undang-Undang Sivil 1956 ('Akta') dibaca bersama dengan A. 15 k. 6A(1) ke (2) Kaedah-Kaedah Mahkamah Tinggi 1980. Atas rayuan, hakim Mahkamah Tinggi mengesahkan keputusan penolong pendaftar dan lagi mengarahkan bahawa injunksi yang dibenarkan olehnya pada 17 Jun 2005 (yang mengekalkan jumlah RM500,000 sebagai cagaran sementara menunggu penyelesaian tuntutan balas defendan) diketepikan. Oleh yang demikian, rayuan semasa oleh defendan.

Diputuskan (menolak rayuan dengan kos)
Oleh Gopal Sri Ram HMP:

(1) Ini merupakan suatu kes di mana tuntutan plaintif pada asasnya berbentuk kewangan berdasarkan suatu klausa di dalam sesuatu perjanjian jual beli tanah. Tuntutan balas defendan berdasarkan suatu pernyataan berfitnah yang dikatakan telah disebut dalam perjalanan persuratan. Soalannya bukan soalan yang ditujukan oleh peguam, iaitu, pemakaian proviso kepada s. 8(1) Akta. Soalan sebenarnya ialah sama ada mengikut prosedur tuntutan tersebut telah diggabungkan dalam kes semasa, yang mesti dijawab menentang defendan. Oleh kerana tuntutan balas dalam kes semasa tidak mematuhi ujian yang ditetapkan dalam *Esso Standard Malaysia v. Southern Cross Airways (Malaysia) Bhd,* ia mesti dibatalkan. Keputusan Mahkamah Tinggi oleh itu boleh dipertahankan atas alasan ini. *Esso Standard Malaysia v. Southern Cross Airways (Malaysia) Bhd* (diikuti); *High Commissioner for India & Ors v. Ghosh* (diikuti); *Mobil Oil Malaysia Sdn Bhd v. Yap Eng Hock* (dibatalkan).

Oleh Sulong Matjeraie HMR:

(1) Pengetepian perintah halangan mengekalkan jumlah RM500,000 yang dibuat oleh hakim Mahkamah Tinggi adalah berpatutan kerana ia adalah suatu perintah berikutnya yang boleh dibuat pada mana-mana masa.

(2) Penolakan rayuan oleh hakim Mahkamah Tinggi adalah betul tetapi ia sepatutnya untuk sebab yang berlainan. Sebagai kanun, suatu tuntutan balas mesti mempunyai kaitan yang mencukupi dengan tuntutan. Afiniti material dengan hal perkara tuntutan mesti ada dalam tuntutan balas supaya ia boleh dikekalkan. Suatu tuntutan balas untuk fitnah tidak boleh dikekalkan dalam suatu tindakan untuk suatu tuntutan meminta deklarasi bahawa klausa dalam perjanjian jual beli yang menyediakan untuk tahanan hasil jualan oleh pemegang amanah tidak mempunyai kesan. Oleh itu tuntutan balas sebegitu langsung tidak sepatutnya difailkan. *Esso Standard Malaysia v. Southern Cross Airways (Malaysia) Bhd* (diikuti).

Case(s) referred to:

Dato' Seri S Samy Vellu v. Penerbitan Sahabat (M) Sdn Bhd & Ors (No 2) [2005] 3 CLJ 493 HC

Esso Standard Malaya Bhd v. Southern Cross Airways (Malaysia) Bhd [1972] 1 LNS 31 HC ***(foll)***

High Commissioner for India & Ors v. Ghosh [1959] 3 WLR 811 ***(foll)***

Mobil Oil Malaysia Sdn Bhd v. Yap Eng Hock [1999] 1 LNS 56 HC ***(ovrd)***

Legislation referred to:

Civil Law Act 1956, s. 8(1)

Rules of the High Court 1980, O. 14A, O. 15 rr. 2(1), 6A(1), (2)

Rules of the Supreme Court 1957, O. 21

For the appellant - Desmond J Louis (S Vijayaretnam with him); M/s LM Ong & Co

For the respondent - Yusuf Khan; M/s Yusuf Khan & Fong

[Appeal from High Court, Johor Bharu; Civil Suit No: 22-311-1998(3)]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram FCJ:

[1] I have had the advantage of reading the judgment of my learned brother Sulong Matjeraie and agree with his reasons. All I wish to do is to add a few words of my own.

[2] As my learned brother has pointed out, this is a case in which counsel clearly missed the target. This is a case in which the plaintiff's claim is essentially monetary in nature based on a clause in an agreement for the sale and purchase of land. The defendant's counterclaim is based on an alleged defamatory statement made in the course of correspondence. The question is not the one that counsel addressed, namely, the application of the proviso to s. 8(1) of the Civil Law Act 1956. The true question is whether as a matter of procedure the counterclaim was properly joined in the present instance. In my judgment that question must be answered against the appellant.

[3] The rule of practice and procedure established by the decision in *High Commissioner for India & Ors v. Ghosh* [1959] 3 WLR 811 is that:

> a counterclaim cannot be maintained unless it is shown that ... (see *Esso Standard Malaya Bhd v. Southern Cross Airways (Malaysia) Bhd* [1972] 1 LNS 31, per Raja Azlan Shah J (as His Royal Highness then was).

[4] In *Mobil Oil Malaysia Sdn Bhd v. Yap Eng Hock* [1999] 1 LNS 56 Nik Hashim J attempted to distinguish the *Esso Standard* case on the ground, *inter alia*, that it was based on O. 21 of the Rules of the Supreme Court 1957 which is differently constructed than RHC O. 15 r. 2(1). He there expressed the view that O. 15 r. 2(1) is wider than its precursor. As I understand his judgment, if the facts of the *Esso Standard* case were to recur today, the result may well be different. With respect I do not agree. In my judgment, the rule in *Ghosh* as explained in the *Esso Standard* case is still good law. It would make nonsense of RHC O. 15 r. 2(1) if it were to be read as permitting a counterclaim that claimed relief which is not sufficiently connected with or allied to the subject matter of the principal claim. I would therefore overrule *Mobil Oil Malaysia Sdn Bhd v. Yap Eng Hock* on this point.

[5] Since the counterclaim in the present case does not meet the test laid down in the *Esso Standard* case it must be struck out. The decision of the High Court may therefore be sustained on this ground.

Raus Sharif JCA:

[6] I have the advantage of reading the judgment of my learned brother Sulong Matjeraie and agree with his reasons that the appeal be dismissed with costs.

Sulong Matjeraie JCA:

[7] The 1st defendant/appellant (hereinafter referred to as 'the defendant') is appealing against the decision handed down by Gengadharan J, on 10 March 2006 in Johor Bahru. The relevant facts of the case are as follows.

[8] The plaintiff/respondent (hereinafter referred to as 'the plaintiff') is the sole administratrix of the estate of her deceased parents while the defendant is, at all material times, a firm of Advocate and Solicitors having its practice at Johor Bahru in the State of Johor.

[9] Pursuant to a sale and purchase agreement, the plaintiff agreed to sell two properties, known as Lot 1698 in EMR 277 and Lot 1699 in EMR 278 Mukim Tebrau, Daerah Johor Bahru (hereinafter referred to as "the said two parcels of land") to the 2nd defendant. The defendant acted for both the plaintiff as well as the 2nd defendant in the sale of the said two parcels of land.

[10] With the assistance of the defendant the plaintiff applied for and obtained a High Court Order to sell the said two parcels of land at a price of not less than RM30 per square feet.

[11] A dispute arose as to the said transaction prompting the plaintiff to seek, *inter alia*, for declaratory relief in the High Court. The plaintiff's claim against the defendant was for *inter alia*, a declaration that the clause in the sale and purchase agreement providing for the retention of the sale proceeds by the defendant as stakeholders was of no further effect and for ancillary reliefs for the release of *inter alia*, the sale proceeds to the plaintiff. The defendant filed a defence and counterclaim.

[12] The counterclaim by the defendant against the plaintiff was that the plaintiff falsely and or maliciously wrote, spoke, communicated, published and/or broadcast defamatory words and statements against the defendant in relation to their refusal to release, *inter alia*, the sale proceeds to her as she had requested.

[13] The plaintiff took out a summons-in-chambers on 24 May 2005 pursuant to O. 14A of the Rules of High Court, 1980 praying for, *inter alia*, the determination of a point of law suitable for determination without a full trial and whether or not the defendant's counterclaim is maintainable in law. The question posed was:

> Whether the first defendant's counterclaim for defamation is maintainable in law, being *ex facie* against her as the administratrix of the estates of the two named deceased persons.

[14] The learned Deputy Registrar answered the above question in the negative and dismissed the entire counterclaim ruling that it was not maintainable in law by virtue of the proviso in s. 8(1) of the Civil Law Act 1956 (Act 67) read together with O. 15 r. 6A(1) to (2) of the Rules of High Court, 1980.

[15] On appeal to the judge in chambers, the learned High Court Judge affirmed the decision of the learned Deputy Registrar and further ordered that the injunction granted by him on 17 June 2005 be set aside, despite no application or submission made by the plaintiff for such an order and while the plaintiff's appeal against the injunction was still pending in the Court of Appeal.

[16] Not satisfied with the decision the defendant is now appealing to us.

Issues Before This Court

[17] The issue for determination on a point of law was whether or not the said counterclaim for defamation against the plaintiff is maintainable in law in the light of the proviso in s. 8(1) of the Civil Law Act, 1956 (Act 67) read together with O. 15 r. 6A(1) of the Rules of High Court, 1980.

[18] The defendant argued that the proviso of s. 8(1) of the Civil Law Act 1956 (Act 67) applies, *inter alia*, to abatement of causes of action, against the estate of the defamer and not against the defaming administratrix. It was argued that the right or cause of

A action in tort of libel must abate by virtue of s. 8(1) of the Civil Law Act, 1956 which applies the general rule of action *personalis moritur cum persona*. No action can be commenced against the estate of a deceased defamer, for if the defamer dies before the verdict is handed down, the action abates, see *Dato' Seri S Samy Vellu v.*
B *Penerbitan Sahabat (M) Sdn Bhd & Ors (No. 2)* [2005] 3 CLJ 493.

[19] The second issue raised by the defendant was that the injunctive order of the learned High Court Judge made on 17 June 2005 for the purpose of preserving the sum of RM500,000 as
C security pending the disposal of the defendant's counterclaim was set aside by the learned High Court Judge following the dismissal of the defendant's appeal without any application or submission made on that point by the plaintiff. At that point of time ie, on 10 March 2006, the plaintiff's appeal to the Court of Appeal against
D the grant of the injunction was still pending.

[20] The defendant argued further that the learned High Court Judge was already *functus officio* and should not have set aside the order granting the injunction.

E **[21]** We will deal with the second issue first.

[22] The setting aside of the order preserving the sum of RM500,000 made by the learned High Court Judge was proper as it was a consequential order which can be made anytime.

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[23] On the first issue we agree with the argument of learned counsel for the defendant that the learned High Court Judge erred in accepting the contention that the counterclaim was not maintainable in law by virtue of the proviso in s. 8(1) of the Civil Law Act 1956 (Act 67) read together with O. 15 r. 6A(1) to (2) of
G the Rules of High Court, 1980.

[24] We however agree with his finding to dismiss the appeal but for a completely different reason. As a rule, a counterclaim must be sufficiently connected with the claim. Material affinity with the
H subject matter of the claim must be present in the counterclaim in order for it to survive. A counterclaim for defamation cannot be maintained in an action for a claim for a declaration that the clause in the sale and purchase agreement providing for the retention of the sale proceeds by a stakeholder was of no effect.

I

[25] In this respect, it is pertinent to quote with our full agreement on what Raja Azlan Shah, J (as His Majesty then was) said in *Esso Standard Malaysia v. Southern Cross Airways (Malaysia) Bhd* [1972] 1 LNS 31; [1972] 1 MLJ 168, at p. 170:

> … I disallowed the counterclaim to form part of the principal claim for the following reasons. It is settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principal claim as to make it necessary in the interest of justice that it should be dealt with along with the claim. Thus a counterclaim for slander cannot be maintained in a claim for money lent. (See, *High Commissioner for India v. Ghosh* [1959] 3 WLR 811). In *Shanghai Hall Ltd v. Townhouse Hotel Ltd* [1967] 1 MLJ 223 I have detailed the various factors which, by no means exhaustive, may influence a judge in the exercise of his discretion under Order 21 rule 15. In the present case the subject matter of the counterclaim is for alleged libel of the defendants' business. I am at a loss to see how the subject matter of the counterclaim has any material affinity at all upon the subject matter of the claim which is a claim for the price of fuel supplied. I therefore ordered the counterclaim to form the subject matter of a separate action.

[26] In the upshot such counterclaim should never have been filed. Consequently this appeal is dismissed with costs. The orders handed down by the learned High Court Judge are affirmed although on different grounds. The deposit shall be paid to the plaintiff to account for taxed costs.